

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Submitted on Briefs October 8, 2009

IN RE **MORGAN S., ET AL.**

Appeal from the Juvenile Court for Anderson County
No. J-25919, J-25920, J-26186 April Meldrum, Judge

No. E2009-00318-COA-R3-PT - FILED FEBRUARY 12, 2010

Father appeals an order terminating his parental rights to his three children. The trial court determined, by clear and convincing evidence, that the father had failed to comply with the permanency plans and had abandoned his children by willfully failing to visit and by failing to provide a suitable home. Because the conditions leading to the children's removal persisted more than six months, the trial court found that there was little likelihood that the conditions would be remedied, and the children would likely be subjected to further neglect if returned to the father's custody. Finally, the trial court concluded that termination of the father's parental rights was in the best interest of the children. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J. and CHARLES D. SUSANO, JR., J., joined.

Henry Forrester, Clinton, Tennessee, for the appellant, Michael R. S.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Joshua Davis Baker, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I. BACKGROUND

Michael R. S.¹ (“Father”) and Leslie D. S. (“Mother”) are the biological parents of Morgan E. S. (d.o.b. 3/29/05), John M. S. (d.o.b. 8/16/06), and Ross M. S. (d.o.b. 11/27/07) (collectively, “the Children”). The parents are married and have been together for approximately six years. Mother and Father own the home from which the Children were removed.

On August 28, 2007, an informant for the Anderson County Sheriff’s Department purchased Oxycontin tablets from Mother at the home where the Children resided. The following day, officers searched the house and found the marked \$50 bill that the informant used to purchase the Oxycontin tablets on Father’s person. The search also uncovered more Oxycontin tablets. Mother told the investigator that she had received the Oxycontin tablets she sold to the informant from Father. She stated that she had sold the tablets to make extra money. Mother admitted that the sale had occurred in the residence while her Children were present. She further related to the investigator that she owed Father \$500 for six Oxycontin and four “go-gos.” Criminal charges were eventually levied against both Mother and Father as a result of the investigation. Federal charges were still pending against Father when the trial was later held.

After a court order was entered, Morgan and John were taken into DCS custody. The order of record relates that Mother sold drugs to an undercover agent, the Children were dirty and appeared to be suffering from neglect, the oldest child had lesions, and Mother had tested positive for opiates, amphetamines, methamphetamines, benzodiazepines, and Oxycodone.

Nearly three months later, Mother gave birth to Ross. Three days after his birth, DCS removed the child from the parents’ custody upon determining that Mother had tested positive for benzodiazepines and opiates on the date of delivery. The trial court entered a protective order placing Ross in the temporary custody of DCS the same day.

Also on that day, the trial court adjudicated Morgan and John dependent and neglected. The court observed that Father’s incarceration² and Mother’s drug abuse were the main factors supporting the dependency and neglect finding. The parents were ordered to make monthly child support payments in the amount of \$100 per child directly to the Tennessee Central Child Support Receipting Unit in Nashville.

¹We do not disclose last names in order to protect the anonymity of the children discussed in this matter.

²During the earlier search, stolen merchandise, including a gun, was found in the residence, and Father was arrested for theft of property.

On December 5, 2007, the trial court held a preliminary hearing concerning Ross's custody. The court upheld the initial removal of the child from custody, finding that Ross had been born with drug exposure. The trial court also affirmed the parents' obligation to make child support payments for all their Children in DCS custody.

Stone Steele served as DCS case manager for all the Children. He met with the parents to jointly prepare permanency plans for Morgan and John on September 12, 2007, and for Ross on December 19, 2007. The plans, signed by both parents and ratified by the trial court, required Father to: (1) visit with the Children in a consistent and meaningful manner and arrive at the visits drug free; (2) provide a safe, stable, positive, drug free home; (3) complete an alcohol and drug assessment, follow the recommendations, submit to random drug screening, and sign releases so that DCS can monitor his progress with the persons providing treatment; (4) provide DCS proof of earning a legal income; (5) prohibit illegal activity from occurring in the home and avoid incurring any new legal charges; (6) complete parenting classes and demonstrate what he has learned. Both parents signed a copy of the criteria for termination of parental rights.³

In January 2008, the parents appeared at a hearing at which they agreed to a stipulation that Ross was a dependent and neglected child.⁴ During that hearing, the trial court ordered Father to procure a legal source of income, gave both parents the option of having supervised visitation, and ordered Mother to have another alcohol and drug assessment.⁵ The record reveals that Mother was dismissed from the drug rehabilitation program at Ridgeview Psychiatric Hospital because she refused to comply with the treatment recommendations. She was later dismissed from a program at Hope of East Tennessee after she missed too many group meetings and continued to test positive for drugs.

In mid-January 2008, DCS began offering therapeutic visitation services to the parents through Ridgeview. Cathy Duncan, a licensed clinical social worker and coordinator in the Family Outreach Program at the facility, met with the parents to discuss the terms of the supervised visitation service. She told the parents that they would have to pass a drug test before they could visit with the Children. She scheduled one visit between the parents and the Children which later was cancelled. Ms. Duncan attempted to reschedule the missed visit and schedule additional visits, but was unable to contact the parents despite several attempts. At the trial, she testified, as follows:

³Mother failed to complete any of the requirements of the permanency plans.

⁴Ross was adjudicated dependent and neglected by order entered March 31, 2008.

⁵Mother's positive drug screen indicated that her previous drug treatment was unsuccessful.

Q Did you make phone calls?

A I made phone calls and left messages and I did not have any contact with them.

Q Did they ever return your phone calls?

A I had one phone call return[ed], it was a voice message and I left a message back in response to that message and I did not talk to her.

In his trial testimony, Mr. Steele observed that he also experienced difficulty contacting the parents. He noted that they often did not have a working telephone. Mr. Steele denied Father's claim of attempting multiple times to contact DCS to set up visits. According to Mr. Steele, when he could not reach the parents in January 2008, he sent a certified letter informing them of an upcoming court date; the parents signed for the letter, but Mr. Steele did not hear from them for more than six months.

On August 8, 2008, DCS petitioned the trial court to terminate the parental rights of the parents to the Children pursuant to Tenn. Code Ann. § 36-1-113(g). The grounds alleged were abandonment for failure to visit and to support, failure to provide a suitable home, substantial noncompliance with the permanency plans, persistent conditions, and best interests.

The following month, Shawn Vincent, an investigator for the Anderson County Sheriff's Department's Narcotics Division, stopped a vehicle driven by Father in Lake City after Father's failure to use his vehicle's turn signal and headlights. Father consented to a search and nothing was found inside the vehicle. Mother, however, was caught attempting to conceal a bag of pills after exiting the vehicle. She claimed to have a prescription for the pills, but she could not produce the prescription or identify the doctor who allegedly issued it. Mother was subsequently charged with possession of a Schedule II narcotic. Father was not charged in this incident.

On the date of trial, October 21, 2008, Mother tested positive for Xanax but did not have a prescription for the drug. In her trial testimony, Mother admitted that she had used methamphetamine during the period of time that the Children had been in DCS custody. She further testified as follows:

Q But you've not been able to free yourself from the drug demon that haunts you?

A Not today, I go in the morning at eight o'clock to the detox, no.

Q But you're still trying?

A Yes.

Q But you haven't succeeded?

A No.

Q In 14 months?

A Correct.

Despite Mother's failure to complete multiple drug rehabilitation programs, Father denied knowing that Mother had been engaging in drug abuse. He testified that his first visit with the Children occurred in July 2008, and he visited three or four times since the Children had been in DCS custody. Father contended that the DCS case manager failed to provide any assistance to him, particularly in scheduling visits with the Children.

At the close of proof, the trial court terminated the parental rights of both parents. In the Termination of Parental Rights and Final Decree of Complete Guardianship, the trial court ruled as follows:

Based upon proof introduced at the hearing and the entire record, from all of which the Court finds by clear and convincing evidence that the petition filed by the State of Tennessee, Department of Children's Services, is well taken and should be sustained and relief granted thereunder for the causes as therein stated in that:

* * *

3. Grounds for the termination of the parental rights of [Mother] and [Father] to the [C]hildren . . . exist, in that:

(a) Respondents . . . abandoned [the Children] by willfully failing to visit or making only token visitation with said children for four (4) months immediately preceding the filing of this petition, despite knowing that said [C]hildren were in state custody and despite being free and able to make such

visits. Mother acknowledged in her own testimony that she had not visited the [C]hildren a single time while they have been in custody for over a year. Moreover, Mother reluctantly acknowledged that she was not able to provide a clean drug screen for DCS before a visit because she had taken some drugs for which she had no prescription. The Court specifically found that the testimony by Mother and Father regarding their attempts to contact the case manager or the case manager's supervisor for visitation not to be credible. The totality of the proof clearly showed that the Mother's failure to visit her [C]hildren was directly related to the requirement that she take a drug test before the visits and her own acknowledgment that she, even on the day of trial, had yet to overcome her addiction to drugs. The Court also found that the Father made only (1) one token visit in the (4) months prior to the filing of the petition. Court finds testimony of Stone Steele entirely credible and that [F]ather was allowed to visit when he could produce a prescription for the drugs for which he tested positive but on other occasions, [F]ather tested positive for drugs for which he had no prescription and thus visitation was denied. Both parents had the ability to visit and had willfully failed to do so, thus constituting abandonment of their [C]hildren, despite DCS making reasonable efforts to accommodate visitation for these [C]hildren.

(b) The Department has made reasonable efforts to assist Respondents, to establish a suitable home for the children . . . but [Father] has made no reasonable efforts to provide a suitable home and demonstrated a lack of concern for the children to such a degree that it appears unlikely that he will be able to provide a suitable home for the children at an early date. Specifically, the Court finds by clear and convincing evidence, th[at] [F]ather has continued to reside with Mother who is clearly using drugs illegally and engaging in ongoing criminal activity. Despite Mother attesting to her use of methamphetamines, xanax and other substances over the past year, Father did not acknowledge that Mother had a drug problem and specifically denied the same in his testimony. Despite realizing that [the] [C]hildren will not be returned to a home where parties reside that are using illegal drugs or legal drugs misused or in violation of the law, the Father continues to choose to reside with Mother and has not established a residence of his own for he and the children to reside. While the structure of the home is safe, the structure is not a suitable home for the children due to the fact that the Mother resides therein while still actively using drugs.

The Court declines to make a finding against the Mother as the only thing that makes the home unsuitable for the children is her living in it, otherwise, its

physical structure is appropriate. Mother's drug use is addressed in the count below.

(c) Respondents . . . have failed to comply in a substantial manner with the statement of responsibilities set out in periodic foster care plans prepared for and signed by said Respondents, following the subject children being found to be dependent and neglected by the Juvenile Court of Anderson County. Children's Services has explained to Respondents those reasonable responsibilities, which are directly related and aimed at remedying the conditions, which necessitate foster care placement. Specifically, the Mother is still using narcotics without a prescription. She was found to be positive for Xanax on the day of the hearing, without a prescription. The Father is still using the same drugs for which he entered treatment, albeit currently with a prescription. Although he has obtained valid prescriptions for the narcotics that he was taking on the date of trial, he acknowledged that when he obtained the same from two different physicians, he did not notify them of his addiction history with narcotic medications or his recent alcohol and drug treatment. Neither parent has completed parenting classes and both parents still have ongoing legal problems. Specifically, the Mother was arrested August 18, 2008, for possession of a schedule II narcotic after Oxycodone and Hydrocodone [were] found in her purse during a traffic stop. The Father was present in the car during this incident. Father still has criminal charges pending that arose from the incident where the children were first removed. [M]other has also failed drug screens and has failed drug treatment three (3) times at three (3) facilities: Peninsula, Hope and Ridgeview Centers. . . .

Father refuses to acknowledge the problem that both he and his wife have with drugs and he appears absolutely unwilling to take necessary steps to regain custody of [the] [C]hildren. Mother appears willing but incapable of overcoming her addiction issues.

. . . The conditions which led to the removal still persist or other conditions persist which in all probability would cause [the Children] to be subjected to further abuse and neglect and which, therefore, prevent the children's return to the care of Respondents. There is little likelihood that these conditions will be remedied at an early date so that the [C]hildren can be returned to Respondents in the near future. The Court found by clear and convincing evidence that very little has changed since the Respondents' initial appearance before the Court. Both parents are still using narcotics, the Mother has been

kicked out of three drug rehabilitation programs for non-compliance, and still tests positive for using narcotics without a prescription.

The [M]other testified that she agreed she had a drug problem, admitted to using narcotic drugs without a prescription and methamphetamine in the past year. Following this testimony, the [F]ather refused to admit the [M]other has a drug problem, further he was unemployed and had not completed his parenting classes.

4. The Court does not find that DCS met its burden of proof regarding abandonment by failure to pay child support.

5. Pursuant to [Tenn. Code Ann.] § 36-1-113(i), it is for the best interest of the subject child[ren] and the public that all of the parental rights of Respondents . . . to the children . . . be forever terminated and that the custody, control and complete guardianship of said child[ren] should now be awarded to the State of Tennessee, Department of Children's Services with the right to place said child[ren] for adoption and to consent to any adoption *in loco parentis*, in that the children have been placed with relatives for a lengthy period of time. The Court found that a termination of parental rights is in the best interest of the children in that the children are placed with a family who are willing and ready to adopt.

(a) Respondents . . . failed to make any adjustment of circumstance, conduct or conditions to make it safe and in the [C]hildren's best interest to be placed in the care of said Respondents. Specifically, as a requirement for reuniting the [C]hildren with the parents, all drug and legal issues had to be cleared up. The [C]hildren were taken into custody due to drug issues, which are still an ongoing problem for both parents. There are still outstanding legal charges, state and possibly federal, pending against the Father and possession of drug charges pending against the Mother, Father is unemployed and neither parent has completed Parenting Classes.

(b) Respondents . . . failed to make a lasting correction of their circumstances after the state has tried to help them since the date of initial custody, and it doesn't appear that lasting change is likely.

(c) Respondents have not maintained regular visitation or other contact with the [C]hildren.

(d) There is no meaningful relationship between the Respondents and [the] [C]hildren.

(e) A change of caretakers and home is likely to have a highly negative effect on the [C]hildren. They are all placed together with a relative and are very content.

(f) Continuation of the legal parent and child relationship greatly diminishes the [C]hildren's chances of early integration into a stable and permanent home. The likelihood that a successful adoptive placement can be found for any child in foster care diminishes as the child grows older and as the amount of time spent in foster care lengthens. An adoptive home is ready to adopt all three [of the] [C]hildren.

* * *

Father filed a timely notice of appeal.⁶

II. ISSUES

Father raised the following issues:

- a. Whether the trial court properly found that clear and convincing evidence supported termination of Father's parental rights.
- b. Whether the trial court properly found that clear and convincing evidence demonstrated that termination of Father's parental rights was in the best interest of the Children.

III. STANDARD OF REVIEW

We employ the following standard of review in cases involving the termination of parental rights:

⁶Mother voluntarily withdrew her appeal.

[T]he Court's duty . . . is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court's findings of fact are reviewed de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. *Id.*; Tenn. R. App. P. 13(d). In weighing the preponderance of the evidence, great weight is accorded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Questions of law are reviewed de novo with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995) (rev'd on other grounds, *In re Swanson*, 2 S.W.3d 180 (Tenn. 1999)); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(l)(1)). "Few consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. *In re Drinnon*, 776 S.W.2d at 97. Tenn. Code Ann. § 36-1-113 is a statute governing termination of parental rights in this state. A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [that termination of the parent's or guardian's rights is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c); *In re F.R.R., III*, 193 S.W.3d at 530. Both of these elements must be established by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights.

In re C.W.W., 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000) (abrogated on other grounds, *In re Aubrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005)).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable. *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546; *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

IV. DISCUSSION

A.

Father argues that none of the termination grounds found by the trial court were established by clear and convincing evidence.

Tenn. Code Ann. § 36-1-113(g) (Supp. 2009) provides:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and non-exclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home

1.

In Tennessee, a court may terminate a parent's parental rights when there is clear and convincing evidence that the parent has abandoned the child. *See* Tenn. Code Ann. § 36-1-113(g)(1). The definitions of abandonment are as follows:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months

following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date.

Tenn. Code Ann. § 36-1-102(1)(A) (i-ii) (Supp. 2009). In discussing willfulness, this court previously noted:

In the statutes governing the termination of parental rights, “willfulness” does not require the same standard of culpability as is required by the penal code. Nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is “willful” if it is the product of free will rather than coercion. Thus, a person acts “willfully” if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

In re Audrey S., 182 S.W.3d at 863-64 (citations omitted).

In finding that Father had abandoned the Children by his willful failure to visit, the trial court observed:

Based on the petition that’s been filed by the Department . . . on ground one for abandonment for failure to visit I find that both parents failed to visit during the four months [preceding] the filing of this petition with the exception of a token visitation in July by the [F]ather. Although, they have indicated that they attempted to contact Mr. Steele I do not find their testimony credible in that regard. . . . [T]hey have had counsel during the pendency of these proceedings [and] both indicated they made no effort to speak with a supervisor nor is there any testimony before me to indicate they actually went to the Department in an attempt to set those visitations up and they were dismissed by the provider Family Outreach Program during that requisite period of time or close thereto that would have afforded regular visitation. They were dismissed for noncompliance from that provider that would have offered regular visitation assuming they could have passed their tests.

Even in the situation where a parent is not at liberty to visit because of a failed drug screen I do still find that’s a willful failure to visit when they knew that passing of a drug screen was a prerequisite to the visitation. . . .

DCS filed its petition to terminate Father's parental rights on August 8, 2008; the period of time measuring whether Father abandoned the Children for failure to visit occurred from April 8 through August 8, 2008. Father completed drug rehabilitation in January 2008, and could have visited the Children at any time thereafter upon passage of a drug screen. Despite the efforts of Ms. Duncan and Mr. Steele, Father did not visit the Children until July 8, 2008 after he eventually passed a drug screen. He visited the Children only three or four times after the first visit. No credible evidence was presented that DCS frustrated Father's attempts to visit the Children.

A parent's choice to continue to use drugs when the parent is prohibited from visiting a child until passage of a drug test constitutes a willful failure to visit the child. *See In re Malaina H.*, No. E2008-00910-COA-R3-PT, 2008 WL 5263600, at *9 (Tenn. Ct. App., E.S., Dec. 16, 2008) (upholding termination of mother's parental rights for willfully failing to visit her child where additional visitation opportunities would have been made available to the mother if she passed a drug test). The record reveals that Father was either unable or unwilling to pass a drug test and exercise visitation rights in a consistent manner during the four-month period before the termination petition was filed. Accordingly, the trial court correctly held that Father had abandoned the Children by willfully failing to visit them.

2.

In regard to the issue of failure to provide a suitable home, the court ruled as follows, at the conclusion of the trial:

I do not find that ground against the [M]other as the home would be suitable but for her presence. I, however, do find the Father has failed to provide a suitable home for [the] Children because he continues to cohabit with someone who is using illegal drugs and the permanency plan is clear it just doesn't say a home, this is not just talking about the structure of a home, it indicates they cannot reside with someone involved in illegal activity.

But not only can the illegal activity not occur in the home, the perm plan specifically says they cannot be involved in illegal activity nor can they reside in a home with someone involved in illegal activity. And because you currently do, sir, reside in the home with someone who is participating in illegal activity then you have failed to provide a suitable home for your [C]hildren. . . .

Father did complete a drug rehabilitation program. However, he chose to remain in his relationship with Mother, and refused to acknowledge that Mother had a drug problem despite her numerous positive drug screens and her sale of drugs from the home while the Children were present. The trial court found that Mother's continued presence in the home in light of her illegal activities rendered the home unsafe for the Children. Father took no action to curb Mother's illegal activity and he refused to remain in contact with the DCS case manager to obtain assistance for himself and his spouse. Accordingly, the evidence does not preponderate against the trial court's finding that Father had abandoned the Children by failing to provide a suitable home.

3.

Tennessee law requires the development of a plan of care for each foster child and further requires that the plan include parental responsibilities that are reasonably related to the plan's goal. *See* Tenn. Code Ann. § 37-2-403(a)(2)(A) (Supp. 2009). A ground for termination of parental rights exists when a petitioner proves by clear and convincing evidence that "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care. . . ." Tenn. Code Ann. § 36-1-113(g)(2).

The trial court ruled as follows:

I do find that both parents have substantially failed to comply with their obligations under the permanency plan. I find again that the [M]other is still using drugs illegally. She is still using one of the primary drugs that she was using at the time her children came into care as is the father albeit with a prescription.

The [M]other is still using. The [M]other – I don't find [your] testimony credible, sir, that you heard this testimony from this witness stand . . . that she said that she purchased Xanax or that she acquires Xanax In fact, she was rather sarcastic, she replied of course those are not hers, that's why she's in rehab, she's got a drug problem. She's very clear in that and clear in her testimony she has in fact used methamphetamines in the last year and your failure to remedy your cohabitation with someone who's using drugs illegally is one area of the permanency plan you've not complied with.

Another area you've not complied with you have not completed your parenting classes. You do not currently have an income [from] employment. I

understood your testimony clearly and that was that you've been laid off that you worked there had only for a period of I believe three weeks that you were already laid off and that you anticipate going back to work November 1st, but as you sit here today that you do not have income produced by employment that was your testimony and I find that you have failed in that regard regarding your permanency plan.

I do find, however, you completed your alcohol and drug treatment. However, if we were simply on a permanency plan hearing this Court would require you to obtain another alcohol and drug assessment in light of the fact you . . . albeit legally, have continued to use prescription pain medications which were one of your initial problems. I further find that both parents continue to have legal issues that remain unresolved. That too was a requirement under the permanency plan, the resolution of legal issues and in your situation, sir, you still have legal issues pending in federal court and as it relates to the Mother she has acquired new legal charges, new criminal charges in addition to those still pending.

I do find that is substantial noncompliance.

The record in this case shows by clear and convincing evidence that Father failed to substantially comply with the terms of the permanency plans. Father completed two of the plans' requirements – he underwent an alcohol and drug assessment and completed an outpatient drug treatment program in January 2008. He did not, however, comply with any of the remaining requirements. He did not comply with the visitation requirement because he failed a drug screen and could not participate in visitation until July 8, 2008, almost one year after the Children came into custody. Father failed to provide a safe, stable, and drug-free home because he continued to reside with Mother while refusing to acknowledge the overwhelming evidence of her drug addiction. He also failed to verify his employment, complete parenting classes, and consistently pass drug screens. As of the time of trial, Father had only paid a total of \$450 of child support. He rejected the best efforts of the agency to assist him in complying with the terms of the permanency plans. Accordingly, the evidence of Father's failure to comply with the terms of the permanency plans was well established and does not preponderate against the trial court's findings.

4.

Under Tennessee law, a court may terminate parental rights when:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

- (i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
- (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
- (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3)(A)-(C).

The trial court held as follows:

As it relates to persistence of conditions I do agree with the Department of Children's Services there is very little that has changed since we first were here. You . . . remained together, you both continue to use narcotics, you have a prescription now, sir, but then you also had a prescription back then when you first went to Hope and they found you needed that treatment. She continues to use Xanax, she has been kicked out of three programs, Family Outreach, Hope of East Tennessee, and Peninsula for a total of three programs that Mother has been asked to leave from and even as we sit here today it is telling to me that she is still positive for Xanax.

I think that attests to the severity of her problem because, certainly, this hearing [date] was known for a lengthy period of time and her inability to refrain from drug use even for this hearing is evidence of a great problem and continued great need, sir, and your unwillingness to acknowledge it from this witness stand eviden[ces] your either inability or unwillingness to protect your children from those problems just as it occurred on that date they came into care.

The factors necessary for finding persist conditions were clearly and convincingly established in this case. The petition to terminate Father's parental rights was filed on August 8, 2008. By that time, the Children had been removed from the home for more than six months pursuant to a court order. DCS removed the Children primarily because of Mother's illegal drug activity. However, Father was also implicated in the illegal activities, as he appears to be the supplier of the drugs sold. The conditions that resulted in the removal of the Children, in particular Mother's drug use, persisted; as a result, there is a little likelihood that the problem will be remedied at an early date so that the Children can safely return to the parents. Father has denied knowledge of Mother's problems with addiction. His refusal to recognize Mother's drug problems coupled with his unwillingness to cooperate with DCS, illustrates that Father is unlikely to adjust his circumstances to allow the safe return of the Children to his care. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A) & (B).

Mother's cousin, Krista Johnson, and her husband have had custody of the Children. Ms. Johnson testified at the trial that the Children were flourishing in her home and that she and her husband had bonded with them. The record reflects that the Children are happy in the Johnsons' home, which has sufficient room for them, and the Johnsons have expressed a willingness to adopt all three Children should they become available for adoption. In view of the fact that a relative has expressed a willingness to adopt these Children, thereby ensuring the preservation of their sibling family unit, continuation of the parent-child relationship with Father would greatly diminish the Children's chances of early integration into a safe, stable home where the Children could grow up together.

A review of the record demonstrates, by clear and convincing evidence, that the conditions which resulted in the Children's removal from Father's custody have persisted for more than six months after the Children were removed; that the conditions are not likely to be remedied in the near future; and that continuation of the parent-child relationship would present an obstacle to the Children's integration into a safe, stable, permanent home. Accordingly, the evidence does not preponderate against the trial court's finding that persistent conditions were established by clear and convincing evidence. The trial court properly terminated Father's parental rights on this ground.

B.

After concluding that clear and convincing evidence supports each of the statutory grounds to terminate Father's parental rights, we must consider whether clear and convincing evidence also supports the trial court's conclusion that it was in the best interest of the Children to terminate Father's parental rights. We are guided by the non-exclusive list of

factors provided in Tenn. Code Ann. § 36-1-113 (i)⁷. As this court has noted, “this list [of factors] is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent’s parental rights is in the best interest of a child.” *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005).

⁷Tenn. Code Ann. § 36-1-113(i) states: In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent’s or guardian’s home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent’s or guardian’s mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The General Assembly has also stated that “when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed.” Tenn. Code Ann. § 36-1-101(d); *see White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004) (holding that when considering a child’s best interest, the court must take the child’s perspective, rather than the parent’s).

The trial court held as follows:

In considering all of the factors I do think it’s in the [C]hildren’s best interest for your rights to be terminated and for them to be placed for adoption. And one factor in my mind is that they are still placed with family and I think to have them placed in a home where they are all together and for a sibling group of this size, currently it’s four although there’s only three being addressed by this petition, but to have all four siblings placed together I have to tell you is rather remarkable especially a home that the parents even approve of to be a suitable and appropriate home.

I don’t find that any lasting adjustment has been made on the part of either parent and I don’t see any time in the near future that all these problems are going to be resolved, in fact, in the near future one or both of you could be imprisoned in state or federal prison for the charges that are still pending. I do find that based on the number of months these children have been in care that the permanence for them outweigh your rights, folks, and they need the permanence, they need to have this matter resolved. And I do finding it’s in their best interest

Father has not changed his circumstances to enable a safe return of the Children to his custody. *See* Tenn. Code Ann. § 36-1-113(i)(1) & (2). Despite his completion of a drug rehabilitation program, Father continued to cohabitate with Mother while she continued to abuse drugs. Father also refused to admit that Mother has a drug addiction and to cooperate with DCS’s efforts to assist his family. Father failed to maintain regular visitation with the Children, visiting only three or four times since they came into DCS custody and failing to visit them at all during the first eleven months of that time period. *See* Tenn. Code Ann. § 36-1-113(i)(3). Further, because Father’s visitation was so infrequent, there is no evidence that a bond between Father and the Children exists – especially between Father and Ross, who was placed in DCS custody directly after Mother giving birth to him. *See* Tenn. Code Ann. § 36-1-113(i)(4).

We agree with the trial court that a change from the Children's present caretakers would be detrimental to their emotional and psychological well-being. Due to living in the Johnsons' home for a significant portion of their lives, the Children are comfortable and are progressing well in the Johnsons' care. *See* Tenn. Code Ann. § 36-1-113(i)(5). The Children are happy in the home, which is large enough to accommodate them, and the Johnsons have expressed an interest in adopting all three Children if they become available for adoption.

The trial court further found that Father provided an unsafe home for the Children because of Mother's presence. There was evidence that Father supplied the drugs that Mother sold, and he incurred criminal charges as a result of her drug selling activities. In consideration of these factors, the home that Father would have provided for the Children cannot be considered safe. *See* Tenn. Code Ann. § 36-1-113(i)(7).

Additionally, Father failed to consistently pay child support as ordered by the trial court. *See* Tenn. Code Ann. § 36-1-113(i)(9). At the time of trial, Father had paid only \$450 for support of the Children despite being ordered to pay monthly \$100 per child to the Tennessee Child Support Receiving Unit.⁸

V. CONCLUSION

For all these reasons, the trial court correctly held that termination of Father's parental rights was in the best interest of the Children. The evidence does not preponderate against the trial court's findings.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Michael R. S. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the court's judgment and for the collection of costs assessed below.

JOHN W. McCLARTY, JUDGE

⁸The trial court did not find abandonment resulted from Father's failure to pay adequate child support.